

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

**GOLDENDALE HOLDING
COMPANY, INC., a Delaware
Corporation, appearing derivatively
through STEVEN JOHNSTON and
DARREN GOOLSBY, shareholders,**

Appellants,

v.

BRETT E. WILCOX,

Respondent.

No. 21836-8-III

Division Three

UNPUBLISHED OPINION

SCHULTHEIS, A.C.J. — When a trial court considers documents outside of the complaint, it converts a CR 12(b)(6) motion to one for summary judgment. We conclude that the trial court in this case erred by converting such a motion without notice and an opportunity for the shareholders to submit materials for consideration and/or by denying the motion to continue the matter under CR 56(f).

FACTS

As a result of their employment with Goldendale Aluminum Company

(Aluminum), Steven Johnston and Darren Goolsby (minority shareholders) own stock in their employer's parent company, Goldendale Holding Company (Holding), a Delaware corporation. Aluminum is the sole asset of Holding. Golden Northwest Aluminum (Golden Northwest) is the parent company of Holding. Brett Wilcox is the president, chairman of the board, and sole shareholder of Golden Northwest. He is the controlling shareholder of Holding, and he is the sole director of Holding and Aluminum.

Historically, Aluminum was primarily in the business of producing aluminum, which requires a large volume of electricity. Aluminum obtained a long-term contract with the Bonneville Power Administration (BPA) to purchase electricity at a fixed rate through September 2001. The terms of the contract allowed Aluminum to remarket the electricity through the BPA.

The minority shareholders filed a shareholder derivative action on July 25, 2002 against Mr. Wilcox for breach of his fiduciary duty to Holding with respect to transactions connected to remarketing the electricity. On October 31, Mr. Wilcox moved to dismiss under CR 12(b)(6). Mr. Wilcox filed a number of documents with his motion including board of directors' meeting minutes, a fairness opinion authored by a firm hired by Mr. Wilcox, and other material to justify the disputed transactions. The minority shareholders responded on December 4, opposing consideration of the documents outside the scope of the complaint or for a continuance under CR 56(f) until discovery had been

conducted concerning the issues raised by the documents.

The trial court heard oral argument on January 22, 2003. Thereafter, the court observed, “[T]his is a case where it’s actually, it’s kind of a hybrid between a 12(b)(6) motion and a summary judgment motion, and to avoid you having to come back on summary judgment, I’ll just make my ruling today.” Report of Proceedings (RP) at 46.

When pressed, the court stated:

It’s actually a summary judgment because I’ve considered things, I think, outside the pleadings. However, the pleadings referred to just about everything that I mentioned . . . and then the parties provided me with the supplemental materials which, according to the court rule, the Court can convert a 12(b)(6) motion into a summary judgment motion if the Court considers things outside the pleadings. Otherwise, I could just have you come back on a summary judgment motion, and I don’t think that you’re going to be able to provide me anything more than I’ve had today as far as making my rulings.

RP at 50.

The court ultimately granted Mr. Wilcox’s motion by entering an order under CR 12(b)(6), and it denied the minority shareholders’ request for adjournment pursuant to CR 56(f). The minority shareholders appeal.¹

DISCUSSION

¹ After the oral argument on this appeal, Mr. Wilcox provided a copy of a Delaware case together with argument in a statement of additional authorities. The minority shareholders responded in kind. RAP 10.8 permits parties to submit additional authorities and identify the issue for which the authority is offered, but it expressly forbids argument. We have not considered the parties’ argument.

Mr. Wilcox asserts that his motion was not converted from a CR 12(b)(6) motion to one for summary judgment. We disagree. The court considered facts and materials outside of the complaint in making its decision. CR 12(b)(6) requires the court to treat this motion as a summary judgment. We are not persuaded by the federal authority cited by Mr. Wilcox or his argument to the contrary.

The minority shareholders contend that the court converted the motion without notice or an opportunity to present materials as required by CR 12(b)(6). The application of a court rule to a particular set of facts is a question of law subject to de novo review. *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001).

The minority shareholders were not informed by the trial court that it would convert the motion for summary judgment until after oral argument on the issue. CR 12(b)(6) requires that “all parties shall be given a reasonable opportunity to present all material made pertinent” in the event of conversion. This compels the court to ask all parties if they wish to present additional materials. *Blenheim v. Dawson & Hall, Ltd.*, 35 Wn. App. 435, 439, 667 P.2d 125 (1983). *See also Jane M. Citizen, I v. Clark County Bd. of Comm’rs*, 127 Wn. App. 846, 853, 113 P.3d 501 (2005) (upholding dismissal under CR 56 where the trial court ruled the opposing party had been given a reasonable opportunity to submit information to support its claims when the court converted the CR 12(b)(6) motion to one for summary judgment, but the opposing party failed to make

a submission); *Foisy v. Conroy*, 101 Wn. App. 36, 40, 4 P.3d 140 (2000) (affirming dismissal when opposing party declined trial court's offer for additional time to respond to motion upon conversion and failed to show he was prejudiced by having too little time to respond).

Mr. Wilcox argues that because the minority shareholders mentioned the possibility of conversion in their responsive pleadings to the CR 12(b)(6) motion, they had actual notice of the trial court's intention to convert the motion. We disagree. Mere awareness of the rule does not deprive the opposing party of the right to have a reasonable opportunity to present materials. The rule does not require the party to present materials before they are invited to do so. The trial court erred.

The minority shareholders also contend that the court erred in denying their motion to continue the summary judgment pursuant to CR 56(f). A trial court may continue a summary judgment hearing if the nonmoving party shows a need for additional time to obtain additional affidavits, take depositions, or conduct discovery. CR 56(f). When deciding whether to apply CR 56(f), "the trend of modern law is to interpret court rules and statutes to allow [a] decision on the merits of the case." *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990) (citing *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982)). The trial court's primary consideration on a motion for such a continuance should be justice. *Id.* at 508. We review a trial court's

decision on a request to continue the summary judgment for abuse of discretion. *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 615, 15 P.3d 210 (2001); *Coggle*, 56 Wn. App. at 504. A trial court abuses its discretion if it bases its decision on untenable grounds or unreasonable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

“The trial court may deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact.” *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003) (citing *Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 90, 838 P.2d 111, 845 P.2d 1325 (1992)). Here, the trial court denied the motion to continue the matter for additional discovery because it did not believe the minority shareholders could provide any new evidence to raise a material issue of fact. But the minority shareholders informed the court that they wished to explore the materials Mr. Wilcox submitted in support of his motion for dismissal. These documents raised questions concerning the procedure by which the transactions were approved as well as the independence of the board that approved it and the thoroughness with which it functioned. These issues are crucial to determine the applicable standard of review with regard to the transaction and to decide which party bears the burden. *See Kahn v. Lynch*

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Commc 'n Sys., Inc., 638 A.2d 1110 (Del. 1994); *Kahn v. Tremont Corp.*, 694 A.2d 422 (Del. 1997); *In re Cox Commc 'ns, Inc. S'holders Litig.*, 879 A.2d 604, 614-15 (Del. Ch. 2005); *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 114 n.24 (Del. Ch. 1999).

The denial of the CR 56(f) motion was an abuse of discretion.

CONCLUSION

The court erred by converting the CR 12(b)(6) motion to one for summary judgment without notice and an opportunity to present materials and by denying the motion to continue under CR 56(f). We reverse and remand for further proceedings.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Schultheis, A.C.J.

WE CONCUR:

Brown, J.

Thompson, J. Pro Tem.